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No. 92-1895 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1993

BANK OF JACKSON COUNTY, PETITIONER

v.

L. JAMES CHERRY AND RAYMOND G. NAEYAERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in this suit for damages against respondents under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), the denial of future loan guarantees to petitioner by the Florida office of the Farmers Home Administration as a means of exerting pressure in a civil dispute violated a clearly established right of petitioner to petition the government for redress of grievances.

2. Whether the denial of future loan guarantees infringed a clearly established liberty interest of petitioner, in violation of the Due Process Clause of the Fifth Amendment.

3. Whether the denial of future loan guarantees infringed a clearly established property interest of petitioner, in violation of the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing, Pet. App. A2-A48, is reported at 980 F.2d 1362. The original opinion of the court of appeals, Pet. App. A49-A97, is reported at 980 F.2d 1354. The opinions of the district court, Pet. App. A98-A169, are unreported.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on January 11, 1993. The petition for a writ of certiorari was filed on April 12, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is an action for damages against two officials of the Florida office of the Farmers Home Administration (FmHA-Florida) in their individual capacities under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Respondent L. James Cherry was the Florida State Director of FmHA. Respondent Raymond G. Naeyaert was FmHA's Florida Chief of Farmer Programs. The claims of petitioner Bank of Jackson County (Bank) arise out of respondents' determination to have FmHA-Florida cease providing guarantees of loans made by petitioner. Pet. App. A98-A99, A110.

In 1981 petitioner made a loan to two dairy farmers, Elmer and Shirley Ferris, to enable the Ferrises to purchase dairy cows. Under the terms of loans that FmHA-Florida had previously made to the Ferrises, FmHA-Florida also had a security interest in the Ferrises' cattle.[1] In March 1982, after the Ferrises began removing cows from Florida in violation of the loan terms, petitioner obtained a writ of replevin and took possession of the remaining cows. Petitioner and FmHA-Florida agreed to sell the cows, and the sale proceeds were placed in an account at the Bank jointly held by FmHA-Florida and petitioner. Pet. App. A3-A4, A153-A154.

In September 1984, petitioner withdrew funds from the joint account in order to extinguish debts owed to petitioner by another farmer. Upon learning of the withdrawal, FmHA-Florida objected. Two years later, in September 1986, FmHA-Florida in-

[1] Aff. of Raymond G. Naeyaert ¶¶ 2-3, attached to Gov't Mot. to Dismiss or in the Alternative for Summ. Judgment (N.D. Fla. June 21, 1989).

formed petitioner that it would not negotiate with petitioner concerning the allocation of funds in the account until petitioner returned the funds it had withdrawn. Pet. App. A154. In April 1988, respondent Naeyaert instructed the supervisor of the FmHA office in Holmes County, Florida, to refrain from guaranteeing any more loans made by petitioner because of the dispute over the proceeds from the sale of the repossessed cows. *Id.* at A111. On June 1, 1988, respondent Cherry sent a letter, drafted by Naeyaert, to the Bank's Executive Vice President informing the Bank that, although FmHA-Florida would honor existing loan guarantees, it was closing the federal government's treasury limited account at the Bank and would not guarantee future loans made by petitioner because of the Bank's refusal to negotiate in good faith concerning the Ferris cow dispute. *Id.* at A111-A112.

On September 9, 1988, because the dispute remained unresolved, FmHA filed suit against petitioner in the United States District Court for the Northern District of Florida to recover the agency's share of the proceeds from the sale of the cows. While that suit was pending, Naeyaert, in a letter dated February 28, 1989, instructed the supervisor of the FmHA office in Jackson County, Florida, to refuse to guarantee a loan made by petitioner because of the unresolved dispute then in litigation and petitioner's failure "to negotiate in 'good faith.' " Pet. App. A9-A10, A113, A115, A155.

2. Meanwhile, petitioner commenced this *Bivens* action against Cherry and Naeyaert. Petitioner alleged that respondents' refusal to conduct further business relations with the Bank constituted a de facto debarment; that respondents had failed to fol-

low the procedures set forth in FmHA's debarment regulations; and that respondents had violated petitioner's due process rights. Petitioner also alleged that respondents had attempted to coerce the Bank into a favorable resolution of the Ferris loan dispute in violation of petitioner's First Amendment right to petition the government for redress of grievances. Petitioner sought compensatory and punitive damages, costs, and attorney's fees against Cherry and Naeyaert in their individual capacities for the alleged violation of petitioner's constitutional rights.[2] Pet. App. A11-A12.

On March 20, 1990, the district court granted summary judgment to respondents with respect to petitioner's First Amendment claim, finding that respondents are entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The court noted that "it is by no means obvious that a government official will violate a business's first amendment rights if, after unsuccessfully attempting to resolve a dispute over assets claimed by both parties, the official terminates the business relationship." Pet. App. A162-A163. The court further noted that "[t]his is especially true in this case, where the evidence suggests that the dispute may reasonably have caused the [respondents] to fear that continued dealings with the [petitioner] would lead to more protracted disputes." *Id.* at A163.

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[2] Petitioner also sought a declaration that respondents, in their official capacities, had failed to comply with the debarment regulations and had violated petitioner's constitutional rights. Petitioner sought injunctive relief to prohibit FmHA-Florida from continuing to refuse loan guarantees in transactions involving petitioner. Pet. App. A12.

On May 14, 1991, the district court denied petitioner's remaining claims for damages under the Due Process Clause, holding that petitioner was not deprived of any constitutionally protected property or liberty interest and that respondents are, in any event, entitled to qualified immunity. Pet. App. A126-A147. The court, however, entered an order granting petitioner injunctive relief on the basis of perceived violations of FmHA's debarment regulations.[3]

3. The court of appeals affirmed. Pet. App. A2-A48.[4] With respect to petitioner's due process claim, the court held that petitioner had no claim of entitlement to FmHA loan guarantees and therefore suffered no loss of a constitutionally protected property interest. Pet. App. A17-A20. The court also concluded that petitioner had not been deprived of a liberty interest. *Id.* at A20-A34. The court assumed, without deciding, that respondents' suggestion that petitioner had acted in bad faith "constituted a stigmatizing allegation." *Id.* at A26. The court concluded, however, that the suggestion of bad faith conduct "was neither sufficiently publicized, nor sufficiently injurious, to deprive [petitioner] of liberty under the Due Process Clause." *Ibid.*

Finally, the court of appeals rejected petitioner's claim under the First Amendment, concluding that respondents are entitled to qualified immunity. The

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[3] Respondents did not seek appellate review of the district court's award of injunctive relief against them in their official capacities. Pet. App. A13.

[4] The opinion of the court of appeals issued on rehearing superseded an earlier opinion that had been rendered by the same panel on July 27, 1992. Pet. App. A49-A97.

court explained that respondents' denial of future FmHA loan guarantees to gain leverage in the civil dispute over the proceeds from the sale of the Ferrises' cows did not deprive petitioner of a clearly established right to petition the government for redress of grievances. Pet. App. A34-A45.[5]

ARGUMENT

1. Petitioner contends (Pet. 27-39) that respondents' decision to stop issuing loan guarantees to the Bank in order to induce it to settle the civil dispute over the proceeds from the sale of the Ferrises' cows interfered with petitioner's right of access to the courts, in violation of what petitioner argues were its clearly established First Amendment rights. That claim lacks merit.

In asserting a First Amendment violation, petitioner relies (Pet. 30 & n.4) on retaliatory prosecution cases in which a government official initiates, or threatens to initiate, criminal proceedings against an individual if the individual does not agree to refrain from filing a civil action against the government or its employees. See, *e.g.*, *Haynesworth* v. *Miller*, 820 F.2d 1245, 1255-1257 (D.C. Cir. 1987); *Sexton* v. *Ryan*, 804 F.2d 26 (2d Cir. 1986) (per curiam).

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[5] Judge Godbold filed a concurring opinion. He joined the court's opinion finding that petitioner was not deprived of a protected property interest. He also concluded that petitioner had not suffered any deprivation of a liberty interest, because petitioner's lending activities were not significantly impaired. Finally, he concluded that petitioner's First Amendment rights were not violated. Judge Godbold explained that, even though FmHA-Florida had terminated petitioner's loan guarantees to gain leverage in the Ferris cow dispute, petitioner did not in fact settle but enjoyed its right of access to the courts. Pet. App. A46-A48.

Those cases, however, do not establish that respondents engaged in unconstitutional access-barring activity. As the court of appeals recognized (Pet. App. A40-A41), the denial of additional loan guarantees from FmHA-Florida involves none of the uniquely coercive consequences that flow from a government official's threat to commence a criminal prosecution. Moreover, the government conduct under challenge here "had many legitimate objectives" (*id.* at A42)—including the protection of the public fisc through recovery of the government's rightful share of the proceeds from the sale of collateral—that were not present in the cases on which petitioner relies.

Petitioner contends (Pet. 34) that the retaliatory prosecution cases involved "a similar benefit to the public fisc" because the government conduct under challenge in those cases was designed to deter lawsuits against law enforcement officials. But here, "[t]he government sought to protect the taxpayers' interest, without protracted litigation, in collateral to which [the taxpayers] had more than a colorable claim." Pet. App. A42-A43. Such good faith conduct is far removed from that involved in the retaliatory prosecution cases, in which the "benefit to the public fisc" results from an attempt to coerce an individual into agreeing not to pursue colorable claims of government misconduct.[6]

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[6] For similar reasons, petitioner's reliance (Pet. 34-35) on *Matzker* v. *Herr*, 748 F.2d 1142, 1150-1151 (7th Cir. 1984)—involving a prison official's refusal to transfer a prisoner to a safer cellblock in retaliation for the prisoner's complaints to a judge about his conditions of confinement—is also misplaced. As the court of appeals noted, Pet. App. A43-A44 n.1, "the prison officer in *Matzker* had no legitimate purpose in seeking to force the prisoner to abandon his claim."

Even if it is assumed that the First Amendment should be extended to regulate respondents' conduct, the decisions cited by petitioner provided no basis for respondents "reasonably [to have] anticipate[d]" that their conduct could provide a basis for an award of damages against them. *Anderson* v. *Creighton*, 483 U.S. 635, 646 (1987), quoting *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984). Accordingly, the court of appeals correctly determined that respondents are entitled to qualified immunity.

2. Petitioner also contends (Pet. 39-56) that respondents' denial of future loan guarantees effected a deprivation of a clearly established liberty interest, in violation of the Due Process Clause of the Fifth Amendment. That fact-bound claim is incorrect and does not warrant this Court's review.

Under the liberty-interest theory that petitioner invokes (Pet. 39-42), a party must demonstrate a " 'stigmatizing' governmental defamation having an immediate and tangible effect on its ability to do business." *Old Dominion Dairy Prods., Inc.* v. *Secretary of Defense*, 631 F.2d 953, 962-963 (D.C. Cir. 1980); *Transco Sec., Inc.* v. *Freeman*, 639 F.2d 318, 321 (6th Cir.), cert. denied, 454 U.S. 820 (1981). Petitioner asserts (Pet. 40) that it suffered the requisite "stigma" when it "was charged * * * with a lack of integrity for failing to deal in good faith with" FmHA-Florida to resolve the business dispute concerning the proceeds from the sale of the cows repossessed from the Ferrises. Petitioner further contends (*ibid.*) that "[t]his stigma was accompanied by a loss of business opportunity, namely, [FmHA-Florida's] refusal to entertain the Bank's future applications for FmHA loan guarantees."

The court of appeals correctly found, on the facts here, that petitioner did not experience the deprivation of a liberty interest protected under the Due Process Clause. Respondents did not communicate to the general public any allegations concerning the Bank's failure to deal in good faith. *Bishop* v. *Wood*, 426 U.S. 341, 348 (1976) (discharge of public employee, terminable at will, did not infringe any liberty interest where reasons for the discharge were not publicly disclosed). Nor did respondents communicate such allegations to other FmHA offices or to any other government agency. Compare *Old Dominion*, 631 F.2d at 955-956, 959, 963-964, 966 n.24 (deprivation of liberty interest occurred where government contractor was found to lack integrity and that determination was communicated through official government channels and resulted in contractor's suspension from bidding on all contracts with Department of Defense); *Larry* v. *Lawler*, 605 F.2d 954, 958 (7th Cir. 1978) (deprivation of liberty interest found where government employee was "stigmatized throughout the entire federal government"). Although personnel at FmHA-Florida were made aware of petitioner's failure to negotiate a good faith settlement of the Ferris loan dispute so that they would implement respondents' decision to deny petitioner access to future loan guarantees from FmHA-Florida, FmHA-Florida did not place petitioner on any agency-wide or government-wide debarment list or otherwise bar petitioner from obtaining loan guarantees from FmHA offices in other States or from other government agencies. In fact, petitioner remained free to obtain, and did obtain, loan guaran-

tees from FmHA's Alabama office. Pet. App. A30-A31.[7]

In these circumstances, petitioner failed to establish that its liberty to do business free from stigmatizing injury was infringed by respondents' actions. The Due Process Clause protects against government-created stigma, in connection with adverse government action, that significantly impairs a person's freedom to engage in future employment or financial opportunities.[8] It does not, as petitioner suggests,

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[7] In addition, FmHA-Florida renewed guarantees of two separate loans made by petitioner—although FmHA-Florida noted that those guarantees were renewed for the benefit of the borrowers, not petitioner, and they were not to be understood as modifying the policy announced in the June 1, 1988, letter. See Pet. 19-20; Pet. App. 10a.

[8] The court of appeals decisions cited by petitioner (Pet. 39, 42, 46) establish no more. See, *e.g.*, *Old Dominion*, 631 F.2d at 955-956 (due process protection applies when government "effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity"); *Bartel* v. *Federal Aviation Admin.*, 725 F.2d 1403, 1414-1415 (D.C. Cir. 1984) (individual's opportunities for future government employment in his field were severely restricted); *ATL, Inc.* v. *United States*, 736 F.2d 677 (Fed. Cir. 1984) (broad suspension from bidding on government contracts); *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092, 1104-1105 (D.C. Cir. 1985) (cloud over future employment as attorney). In *Reeve Aleutian Airways, Inc.* v. *United States*, 982 F.2d 594, 595, 598 (D.C. Cir. 1993), the court of appeals concluded that temporary suspension from a military airlift transportation program constituted a significant deprivation of liberty, even though the airline remained free to seek business elsewhere. Although, compared to prior cases, *Reeve* reduced the quantum of injury needed to establish interference with a protected liberty interest, *id.* at 598, that case is of no assistance to petitioner. As the court noted

encompass a "liberty" to continue enjoying access to the very government benefits that are being denied. *Bishop* v. *Wood*, 426 U.S. at 343, 348 (termination of police officer for insubordination, causing low morale, and engaging in unbecoming conduct did not implicate liberty interest); *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972) (no liberty interest at stake where plaintiff did not allege that the "State, in declining to re-employ [him], imposed on him a stigma or other disability that foreclosed his freedom to take advantage of *other* employment opportunities") (emphasis added); *Sutton* v. *United States Dep't of Housing & Urban Dev.*, 885 F.2d 471, 475 (8th Cir. 1989) ("nonrecertification, the reasons for which were not made public, does not impose a stigma or foreclose [the appraiser] from seeking appraisal work outside the HUD referral system"), cert. denied, 493 U.S. 1075 (1990).

Here, petitioner has not alleged that respondents' conduct resulted in any cognizable stigma that significantly impaired petitioner's ability to take advantage of other business opportunities.[9] Although

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in *Reeve*, "branding an airline unsafe creates a lasting blemish on a company's reputation." *Ibid.* Moreover, even if *Reeve* represents a correct extension of the law concerning liberty interests, respondents could not reasonably have anticipated that extension in 1988 and 1989, when the events giving rise to this *Bivens* action took place. Accordingly, *Reeve* does not undermine respondents' entitlement to qualified immunity.

[9] Petitioner errs in suggesting (Pet. 44-47) that any decision by it to disclose to its customers the reason for respondents' refusal to provide additional loan guarantees would constitute a "stigmatizing" injury attributable to the government. The consequences of petitioner's voluntary decision to

petitioner was denied access to FmHA-Florida loan guarantees, its ability to pursue business opportunities with, or obtain benefits from, individuals or groups (public or private) other than FmHA-Florida remained unaffected. Petitioner was able to obtain loan guarantees from other offices within FmHA and was free to apply for any government benefit and do business with any other government agency or private party. The concept of an impairment of "liberty" does not embrace a purported stigmatizing injury with respect to the limited foreclosure of business opportunities that occurred here.

3. Finally, petitioner argues (Pet. 56-64) that it had a clearly established property interest in receiving loan guarantees from FmHA-Florida. That is incorrect. The law in fact is clearly established that the interest in contracting with the government constitutes "an abstract need or desire," not a "legitimate claim of entitlement" that constitutes protected property. *Board of Regents* v. *Roth*, 408 U.S. at 577; *Associated Builders & Contractors, Inc.* v. *City of Seward*, 966 F.2d 492, 499 (9th Cir. 1992), cert. denied, 113 S. Ct. 1577 (1993); *Smith & Wesson* v. *United States*, 782 F.2d 1074, 1081 (1st Cir. 1986); *Eastway Constr. Corp.* v. *City of New York*, 762 F.2d 243, 249-250 (2d Cir. 1985); *Arrow Air, Inc.* v. *United States*, 649 F. Supp. 993, 999 (D.D.C. 1986). Accordingly, those who are suspended from doing business with the government are not deprived of any property interest that is protected under the Due

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reveal FmHA-Florida's doubts about its good faith to its customers are not the result of government action. Pet. App. A31 ("[T]he government imposed no duty upon [petitioner] to disclose the *reason* for its debarment.").

Process Clause. *Sutton* v. *United States Dep't of Housing & Urban Dev.*, 885 F.2d at 474; *ATL, Inc.* v. *United States*, 736 F.2d 677, 683 (Fed. Cir. 1984); *Transco Sec., Inc.* v. *Freeman*, 639 F.2d at 321.

Petitioner acknowledges those cases (Pet. 62), but contends that they ignore the analysis of an earlier court of appeals decision, *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964). As the court of appeals in this case recognized, however, *Gonzalez* is inapposite. Pet. App. A19-A20. The plaintiffs in *Gonzalez* had been debarred from participating in any program financed by the Commodity Credit Corporation. The court held that the debarment was contrary to statute and noted that to conclude otherwise would raise "serious constitutional issues." *Gonzalez* v. *Freeman*, 334 F.2d at 579. *Gonzalez*, however, did not state that any constitutionally protected property right was at stake. On the contrary, in discussing the contractor's standing to sue, the court acknowledged that "[o]f course" a government contractor does not have a "legal right"—*i.e.*, a property right—to the contracts for which it bids. *Id.* at 574. The better reading of *Gonzalez* is that the "serious constitutional issue[]" that the court perceived arose from the impact of the government's action on what might have been a protected *liberty* interest. See *Myers & Myers, Inc.* v. *United States Postal Serv.*, 527 F.2d 1252, 1258 (2d Cir. 1975) (following *Gonzalez* and suggesting that a stigimatizing debartment may interfere with "economic liberty"). Nothing in *Gonzalez* supports the inference of a protected *property* interest. See *Old Dominion*, 631 F.2d at 962 (noting that, under *Gonzalez*, a contractor has standing to

challenge debarment, even though it "had no 'property' interest in the contract awards").[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1993

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[10] To the extent that *Gonzalez* is read to suggest that government contractors have a property interest in bidding for future business with the government, it is inconsistent with the analysis of *Board of Regents* v. *Roth*, 408 U.S. at 577, which makes clear that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." See *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 (1985). The *Gonzalez* court did not purport to identify any "rules or understandings" that entitled the contractor there to enjoy future government business. Nor does petitioner make such a showing here.

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